IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1146

CIA DE NAV. MAR. NETUMAR,

Petitioner,

against

JOAQUIM CONCEICAO, NEW JERSEY EXPORT MARINE CARPENTERS, INC., and INTERNATIONAL TERMINAL OPERATING CO., INC.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondent, Joaquim Conceicao, Prays That Petition by Cia De Nav. Netumar Be Denied

Citations of Opinions Below

The affirming opinion of the Court of Appeals for the Second Circuit is reported at 508 F.2d 437 (1974). The

memorandum opinion of the trial court that the evidence presented supported the jury's verdict is not officially reported (See Appendix to Petition A1-A4).

Jurisdiction

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C., §1254(1).

Question Presented

Where the trial court and circuit court of appeals have found and sustained that the jury concluded with reason the petitioner shipowner was negligent, should this court entertain further review?

Statement of the Case

This is a longshoreman personal injury case for damages. The petitioner shipowner was sued for negligence and unseaworthiness; respondent, New Jersey Export Marine Carpenters Inc., was also sued as defendant for negligence and breach of warranty of workmanlike performance owed to plaintiff, an International Terminal Operating Co. Inc. longshoreman. Both defendants crossclaimed against each other and both impleaded the employer, International Terminal Operating Co. Inc., as a third-party defendant alleging breach of warranty of workmanlike performance. After a five day trial, a jury verdict was returned in favor of plaintiff and against petitioner, Netumar, for $42,000.00 on the grounds of negligence. In response to specific interrogatories, the jury found the vessel to be seaworthy; New Jersey Export

was neither negligent nor in breach of any warranty owed plaintiff; and that while International Terminal Operating Co. Inc. was guilty of breach of its warranty of workmanlike performance, the conduct of petitioner, Netumar, was such that it was precluded from recovering on its indemnity claim.

Post-trial motions by the petitioner, Netumar, were in all respects denied (A1-A4 Appendix to Petition).

The verdict of the jury and the decisions below affirming that verdict turn upon the facts presented in this case. The facts were reviewed at length in the opinion of Judge Medina reported at 508 F.2d 437 (A5-A18).

Reasons for Denying the Writ Sought by Petitioner

Petitioner has not demonstrated any conflict in decisions on any issue of substantive law to merit review by this court.

While the injuries sustained by the respondent, Conceicao, were serious, and the litigation is a matter of substantial consequence among the parties, the outcome affects no one other than the litigants.

The rights of the parties as have been determined by the jury are constitutionally protected in accordance with *Atlantic and Gulf Stevedores Inc.* v. *Ellerman Lines,* 369 U.S. 355, 82 S.C. 780, 7 L.Ed. 2d 798 (1962), rehearing denied, 369 U.S. 882, 82 S.C. 1137, 8 L.Ed. 2d 284 (1962).

The jury determined there was sufficient evidence to justify holding the shipowner negligent, and this determination has been affirmed by the Trial Court and the Circuit Court of Appeals.

The argument by the shipowner that the decision of the Court of Appeals misinterprets the decisions of this Court

in *Usner* v. *Luckenbach Overseas Corporation,* 400 U.S. 494, and *Mitchell* v. *Trawler Racer Inc.,* 362 U.S. 539 fails in the face of the specific finding by the Court of Appeals: "II *The Shipowner was at Fault in Many Respects*" 508 F.2d 437, 440.

The second reason for granting the writ propounded by petitioner alleges the Court of Appeals went "outside the record" in making its determination. Those matters referred to by petitioner are specifically based on evidence in the record, or reasonable inferences which a jury may have made in reaching its conclusion. Petitioner misconstrues the function of the appellate court in making this argument.

Respondent, Conceicao, specifically excepts to Petitioner's third argument (p. 8, Brief for Petitioner) regarding an alleged concession made upon oral argument before the Second Circuit Court of Appeals. What was stated in response to a question from the bench was that no argument by counsel was made to the jury in *summation* on the issue of overloading. The evidence was in the case and, therefore, triable by the jury. *Cooper* v. *D/S A/S Progress,* 188 F. Supp. 578 (D.C. Pa., 1960). The Court of Appeals specifically held:

> ". . . That the jury could have found that the accident was caused by the overloading of the pipe crib is perfectly plain to us." (508 F.2d 437, 440)

The fourth argument of the petitioner is directed to its claim for indemnification against the employer, International Terminal Operating Co. Inc. This argument is not directed against respondent, Conceicao, but it is respectfully submitted to the Court that the issue is one which does not merit consideration by this court. The question presented has been rendered moot for further cases

occurring after November 26, 1972 by reason of the amendments to the *Longshoremen and Harbor Workers' Compensation Act,* P.L. 92-576, 86 Stat. 1263, 33 U.S.C. §905(b).

There is no merit to petitioner's contention that the finding of negligence is inconsistent with the finding the vessel was seaworthy, and therefore not legally sustainable. See *Gallick* v. *Baltimore and Ohio R.R.,* 372 U.S. 108 (1963); *Atlantic and Gulf Stevedores, Inc.* v. *Ellerman Lines,* supra; *Malm* v. *United States Lines,* 269 F. Supp. 731 (S.D.N.Y.) *aff'd. on the district court's opinion* 378 F.2d 911 (2 Cir. 1967); and *Henry & Braye* v. *A/S Ocean and John P. Pederson & Sons* (decided Jan. 6, 1975 docket nos. 73-2153, 73-2868, 2d Cir.; —— F2d ——).

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Conditional Cross-Petition

Respondent, Conceicao, respectfully prays that this Court issue Writ of Certiorari on those portions of the judgment in which judgment was entered in favor of petitioner, Netumar, on the cause of action for unseaworthiness, and in which judgment was entered in favor of respondent, New Jersey Export, on the causes of action for negligence and breach of warranty, only in the event this court should grant the Petition for Writ of Certiorari brought by Cia De Nav. Mar. Netumar.

• • •

CONCLUSION

The Petition does not set forth substantial legal issues or conflicts of doctrines or decisions which would merit review by this Court, and respondent, Conceicao, respectfully urges that the Petition be denied.

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